Supreme Court, U.S.
FILED
APR 22 1991
OFFICE OF THE CLERK

No. 90-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.E. JOHNSON COMPANY, *et al.*,
Petitioners,

v.

ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Is there a dangerous probability of a firm achieving, or can it have, monopoly power in a government contract bid market where there is neither allegation nor evidence of collusion, there are other competitors and entry has occurred?

2. Does a monopolist cause antitrust injury by pricing above its own, but below its rival's, costs?

LIST OF PARTIES

The parties to the proceeding below were the petitioners S.E. Johnson Company, S.E. Johnson Companies, Inc., The Ohio Engineering Company, Fred R. Creager & Sons, Inc., MATCO Asphaltic Concrete Producing Co., OAMCO, Inc., C.P. Calaway, Inc., Maumee Stone Company, Michigan Stone Company, Wolcottville Sand & Gravel Corp., Saxon Development Company, Stoneco, Inc., and J.T. Kirkby and the respondents Arthur S. Langenderfer, Inc., Northern Ohio Asphalt Paving Co., MacRitchie Materials, Inc., M&B Asphalt Co., Inc., G.M. Sader Excavating & Paving Co., Inc. Petitioners have no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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Petitioners S.E. Johnson Company, S.E. Johnson Companies, Inc., The Ohio Engineering Company, Fred R. Creager & Sons, Inc., MATCO Asphaltic Concrete Producing Co., OAMCO, Inc., C.P. Calaway, Inc., Maumee Stone Company, Michigan Stone Company, Wolcottville Sand & Gravel Corp., Saxon Development Company, Stoneco, Inc. and J.T. Kirkby (collectively "Johnson") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on October 29, 1990.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 917 F.2d 1413, and is reprinted in the appendix to case

number 90-1581 filed in this Court on April 12, 1991.[1] (App. A1). The Order of the Court of Appeals denying rehearing is unreported. (*Id.* at A122). The opinion of the Court of Appeals following the first trial in this case is reported at 729 F.2d 1050.

JURISDICTION TO REVIEW

The Court of Appeals rendered judgment on October 29, 1990. (App. A1). Timely petitions for rehearing were denied on January 23, 1991. (*Id.* at A122). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988), which provides in relevant part:

> Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce . . . shall be deemed guilty . . . .

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (1988), which provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

The full text of these statutes is reprinted in the referenced appendix. (App. A124-25).

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[1] Citations to "App." throughout this Petition are to the Appendix in case number 90-1581.

STATEMENT OF THE CASE

A. INTRODUCTION

This petition asks the Court to examine two important questions arising under the antitrust laws. First, is there any danger that a firm may achieve monopoly power in a bid market where there are other bidders, no barriers to entry and no evidence of collusion? Second, does a competitor suffer antitrust injury by reason of a monopolist's low, but nonpredatory bids?

In affirming a judgment for respondent Arthur S. Langenderfer, Inc. ("Langenderfer"), the Sixth Circuit held that a firm that consistently wins contracts by submitting profitable low bids is guilty of monopolization and liable to its less efficient competitors for treble damages. This ruling undercuts the policies embodied in the antitrust law by penalizing aggressive competition and rewarding inefficiency. It has far-reaching implications for taxpayers and all government agencies that award contracts by competitive bid because it cautions bidders that low bidding can lead to antitrust liability to inefficient competitors.

B. THE HIGHWAY PAVING INDUSTRY IN NORTHWEST OHIO

This litigation results from increased competition for competitively bid highway paving contracts awarded by the Ohio Department of Transportation ("ODOT") and the Ohio Turnpike Commission ("OTC") in a thirteen-county area of northwest Ohio.

Ohio law, like many other government procurement laws,[2] requires competitive bids for road construction

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[2] Federal law mandates competitive bidding in numerous con-

contracts. Ohio Rev. Code Ann., Chs. 5525 and 5537 (Page 1985). The letting authorities determine where and if a project will be let, award contracts to the lowest qualified bidder, and reserve the right to reject any and all bids. *Id.* Since there is no product differentiation, firms compete on price alone.

C. COMPETITION INCREASED IN THE 1970S AND HAS REMAINED VIGOROUS EVER SINCE

The amount of paving work in northwest Ohio dropped by more than half in the 1970s. At the same time, new contractors entered the market and the number of bidders per job increased. Prices fell.

Johnson met the competitive challenge by becoming more efficient, diversifying into related work and expanding into new areas. This enabled Johnson to bid more jobs at lower prices. Consequently, although Johnson's net margin declined, its total revenues and total profit increased.

Langenderfer pursued a different strategy. It did not expand, diversify or take other steps to reduce costs. Langenderfer increased the volume of ODOT and OTC work it performed, but suffered ever-increasing losses because its bids did not always cover overhead.

Unable to compete, Langenderfer invited Johnson to "raise bid prices" and to "stabilize the market."

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texts. Generally, executive agencies are required to obtain full and open competition in the procurement of property or services preferably through the use of sealed bids. 41 U.S.C. § 253(a) (1988). Similarly, federal law requires competitive bidding for federal expenditures for highway construction and repair. 23 U.S.C. § 112 (1988). All fifty states and the District of Columbia require competitive bidding in one circumstance or another.

Johnson refused, and Langenderfer sued, complaining that Johnson was bidding too low and violating Section 2 of the Sherman Act. Langenderfer thus invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337 (1988) and 15 U.S.C. § 15(a).

Although Langenderfer went out of business in 1978, competition has not slackened. Since then, fifty-one different contractors have bid on, and twenty-three have won, jobs in the relevant market. New firms continue to enter. Prices, and profit margins, remain low.[3]

D. THE FIRST TRIAL AND APPEAL

Langenderfer and a sister asphalt paving producer commenced this litigation in 1976. At the first trial in 1980, Langenderfer complained that Johnson's above-cost bids constituted predatory pricing. Johnson appealed and Langenderfer cross-appealed under 28 U.S.C. § 1291 (1988). The Sixth Circuit reversed a judgment for plaintiffs, holding that Johnson was not required to maintain artificially high prices for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." 729 F.2d at 1057. Although evidence of anticompetitive conduct was "meager at best," the Sixth Circuit remanded for a second trial. *Id.* at 1055 n.9.

E. THE SECOND TRIAL AND APPEAL

At the second trial, additional contractors and Langenderfer's affiliated limestone quarry joined as plaintiffs. Plaintiffs contended that, beginning in 1971,

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[3] The stated facts, all based on respondents' evidence, are not disputed.

Johnson monopolized and attempted to monopolize the production and supply of raw materials (asphalt, limestone and sand) for ODOT and OTC paving jobs. Plaintiffs also contended that Johnson monopolized and attempted to monopolize the bidding and performance of such contracts, and that Johnson had engaged in various anticompetitive acts made possible by market power in the raw material markets. The jury returned a verdict for each plaintiff.

Both parties again appealed under 28 U.S.C. § 1291. The Sixth Circuit reversed judgments for each plaintiff except Langenderfer. The Sixth Circuit held that:

1) There was no evidence that Johnson either possessed or was likely to obtain monopoly power in any raw material market (App. A33-34, A37-38, A40, A41, A42-43);

2) Johnson achieved scale economies that enabled it to operate at a lower cost (*id.* at A55, A60);

3) there was no basis for the allegations that Johnson engaged in the specified anticompetitive conduct (*id.* at A53-54, A60);

4) Johnson had not engaged in predatory pricing (*id.* at A55);

5) Johnson's low bidding benefited the public and had continued for many years (*id.* at A15, A55, A67-68); and

6) new competitors had entered the market (*id.* at A14, A70).

The Sixth Circuit, stating that "the issue is a very close one," affirmed the decision for Langenderfer

(*id.* at A61), holding that there was a sufficient factual showing to support a finding that Langenderfer suffered injury that resulted from "a lessening of competition due to acquisitions or from 'anticompetitive acts made possible' by the acquisitions." (*Id.* at A60). The lengthy opinion eschews any explanation of the basis for its holding that Johnson monopolized a bid market, or that acquisitions (without proof of subsequent anticompetitive conduct) caused Langenderfer to suffer antitrust injury.

Johnson filed a petition for rehearing. Langenderfer and the other plaintiffs filed a petition for rehearing and a suggestion that the rehearing be *en banc*. The Sixth Circuit denied the petitions on January 23, 1991.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit now holds that an aggressive firm that cuts prices and refuses to rig bids may nevertheless face treble damage payments for losses by less efficient competitors. The consequences of this interpretation of Section 2 are less competition and higher prices. The antitrust laws cannot intend such a perverse result.

The Court should review the Sixth Circuit's rule because it may stifle competition in bid markets. Firms that once were urged to bid as low as possible and to win the most contracts may now be content to bid higher and win fewer jobs.[4] The holding thus

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[4] Commentators have cited the Sixth Circuit's first decision in this case as one of the cases involving application of the antitrust laws to government contracting. Dameron and Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, 17 Pub. Cont. L.J. 500, 502 n.5 (June 1988);

creates a fundamental conflict between competitive bid statutes and the antitrust laws. A contractor like Johnson cannot know whether its low bid, submitted in full compliance with the letter and spirit of competitive bid statutes, will be treated by the courts as aggressive competition or monopolizing conduct. This conflict demonstrates that the Sixth Circuit has misconstrued the antitrust laws.

Competitive bidding to supply standardized, undifferentiated products is competition at its purest; the objective: to obtain the lowest price possible. The virus that threatens competitive bid markets is not low prices; it is collusion. Between December 14, 1979 and January 10, 1991, the Department of Justice filed 346 indictments and informations in cases involving bid markets. All have involved collusion; none has involved monopolization of bid markets by a price cutter.

One consequence of the Sixth Circuit's decision is that firms may be tempted to divide the market to avoid the dangers of monopolization. Bid rigging, which is rampant and difficult to detect, may increase.

The holding that Johnson possessed monopoly power in a bid market rests on market share, but market share does not establish market power in a bid market. The fact that prices were low for more than fifteen years provides "strong evidence" that Johnson

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Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Agencies In Markets for Specialized Government Products*, 57 Antitrust L.J. 543, 552 n.20 (1988). The Sixth Circuit's second decision thus may be looked to by the many sophisticated firms and attorneys involved in government contracting for guidance on the applicability and interpretation of the antitrust laws in the bid context.

lacks monopoly power. *Matsushita Electric Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 591 (1986). The Sixth Circuit avoided discussing when, if ever, a firm in a bid market may possess monopoly power, but the result it reached conflicts in principle with the decision of the Eighth Circuit in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985).

The Sixth Circuit awards treble damages to a competitor for losses from non-predatory prices. This holding rewards the inefficient and punishes both the entrepreneur and the consumer. In holding that Langenderfer suffered antitrust injury, the Sixth Circuit apparently relied on acquisitons, but acquisitions, without more, do not give rise to antitrust injury to a competitor. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). The Sixth Circuit failed, however, to specify any conduct that caused the injury. The opinion finds no monopolization of raw materials, no dependence on Johnson for raw materials, and none of the anticompetitive acts alleged. In effect, the Sixth Circuit affirmed a finding of antitrust injury because Johnson profitably bid lower than Langenderfer. Upholding a finding of antitrust injury in such circumstances is inconsistent with this Court's decisions in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990), *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill*, 479 U.S. 104.

The Sixth Circuit's decision is of considerable economic significance to federal, state and local governments, which award billions of dollars of contracts annually through competitive bidding, and to the taxpayers who pay for these projects. The decision also

has broad implications for the administration of the antitrust laws because it potentially creates a new cause of action against those who succeed too well.

I. MONOPOLY POWER MAY NOT BE FOUND IN A GOVERNMENT CONTRACT BID MARKET WHERE ACTUAL AND POTENTIAL COMPETITORS ARE PRESENT

A. Market Share Does Not Establish Monopoly Power In a Bid Market

In upholding the jury's finding that Johnson possessed, or was likely to achieve, monopoly power, the Sixth Circuit relied primarily on data showing that Johnson had won fifty-eight percent of the relevant market contracts between 1972 and 1978:

> [T]he above data, accompanied by the paving contractor and asphalt plant acquisitions . . . are sufficient to indicate that Langenderfer may reasonably have proved the cause of action alleged, coupled with the defendants' high percentage of ODOT winning bids . . . and other circumstances of defendants' growing economic power.

(App. A60).[5]

The Sixth Circuit's reliance on market share evidence to support a finding of monopoly power in a bid market is misplaced. In a bid market, market share represents nothing more than the number of times a firm submitted the low bid; it is not a proxy for monopoly power. ABA Monograph, *Horizontal*

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[5] The Sixth Circuit discussed the paving contractor and asphalt plant acquisitions separately and concluded that none of them involved a significant competitor of Johnson in the relevant market. (App. A56-57).

Mergers: Law and Policy 159 (1986). Indeed, the Justice Department assigns an equal share to each firm in the market when evaluating concentration in bid markets. Department of Justice Antitrust Guidelines for International Operations, 53 Fed. Reg. 21584, 21602-03 (1988). This approach is consistent with precedent in this Court: "Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice." *United States v. El Paso Nat'l Gas Co.*, 376 U.S. 651, 661 (1964).

The market share evidence, showing annual swings in Johnson's market share of as much as forty-five percent, illustrates that market share cannot be equated with monopoly power in a bid market. A high market share in one year neither predicted nor guaranteed a high share in succeeding years. Rather than reflecting monopoly power, wide swings in market share reflect competitive vigor and an inability to exclude competition or to raise prices. *See* FTC Statement on Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 13,200 at 20,902 (1982); 1984 Merger Guidelines of Department of Justice, 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,563-64.

B. Monopoly Power Cannot Exist In A Bid Market As Long As Other Firms Have The Ability To Compete

Monopoly power is the ability of a single firm "to raise prices above those that would be charged in a competitive market." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984). Competitive bidding is the antithesis of monopoly power because no firm can successfully raise prices, absent collusion, and continue to win jobs.

The Eighth Circuit recognized this in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985). *Alderson* involved a competitor challenge to the award of an annual court reporting contract. The plaintiff claimed that the successful bidder monopolized and attempted to monopolize court reporting services in the United States Tax Court by submitting a predatory, below-cost bid.

The Eighth Circuit affirmed summary judgment for the defendant, holding that the defendant lacked monopoly power as a matter of law because it could not raise prices and still win the contract. The court held that a single firm could not acquire monopoly power in a competitive bid market where there were several actual and potential bidders. *See also Kirk-Mayer, Inc. v. Pac Ord, Inc.*, 626 F. Supp. 1168 (C.D. Cal. 1986).[6]

Here, it was undisputed that there were many actual and potential competitors. Moreover, the Sixth Circuit recognized "that government bidding at low prices over a lengthy period was at the heart of this case" (App. A67), that Johnson's profit margins declined during the relevant time (*id.* at A63) and that "other competitors . . . have emerged as bidders . . . during the relevant years" (*id.* at A70). In upholding a finding of monopoly power, the Sixth Circuit ignored these facts. Its decision conflicts in principle with the holding of the Eighth Circuit in *Alderson*.

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[6] This is not to say that a bid market can never be monopolized. For example, where a firm engages in conduct to destroy the bid process or forecloses other firms from bidding, monopolization may be found. *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

The holding that monopoly power might, as a matter of law, be established in such circumstances also conflicts with antitrust principles recognized by this Court. In *Cargill*, this Court held that the relevant inquiry is whether entry would occur during a period of supra-competitive prices. 479 U.S. at 119 n.15. Where, as here, entry occurred during a protracted period of low prices, entry would be likely if prices were to rise. In *Matsushita*, this Court stated:

> [W]ithout barriers to entry it would presumably be impossible to maintain supra-competitive prices for an extended time.

475 U.S. at 591 n.15. This Court also stated that the failure to raise prices over an extended period of time provides strong evidence that monopoly power does not exist. *Id.* at 592.

The Sixth Circuit decision upholding monopoly power cannot be reconciled with this Court's decisions in *Cargill* and *Matsushita*.

II. A MONOPOLIST'S LOW, NON-PREDATORY PRICES DO NOT GIVE RISE TO ANTITRUST INJURY TO A COMPETITOR

This Court's antitrust opinions make clear that a private antitrust plaintiff can sue only when the nature of its injury reflects the anticompetitive effects that make the conduct unlawful. "A private plaintiff cannot recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.' " *Atlantic Richfield*, 110 S. Ct. at 1889 (*quoting Brunswick*, 429 U.S. at 489). An "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive

aspect of the practice under scrutiny. . . ." *Atlantic Richfield*, 110 S. Ct. at 1889. The antitrust injury requirement thus prevents an award of damages "for losses stemming from continued competition." *Cargill*, 479 U.S. at 109-10.

The Sixth Circuit relied on "acquisitions, elimination of competition, and other anticompetitive conduct by defendants" (App. A60-61), but offered no analysis of whether Langenderfer's injury reflected the anticompetitive effect that made such conduct unlawful. Had the Sixth Circuit done so, it would have seen that any finding of antitrust injury would be inconsistent with the decisions of this Court.

With respect to acquisitions and elimination of competition, the Sixth Circuit held that the acquisitions of paving contractors did not eliminate competition or significant competitors of Johnson. (App. A56-57). In any event, if the acquisitions had resulted in a lessening of competition, Langenderfer would have benefited from the resulting higher prices. *Matsushita*, 475 U.S. at 582-83. Without proof of anticompetitive conduct, the acquisitions standing alone could not give rise to antitrust injury to a competitor like Langenderfer. *Cargill*, 479 U.S. at 122.

In *Cargill*, the plaintiff alleged that a merger of competitors would result in efficiencies that would allow defendants to offer low, non-predatory prices with which the plaintiff could not compete. 479 U.S. at 115. This Court assumed that the merger would violate the antitrust laws. That was not enough to support a finding of antitrust injury to the plaintiff competitor. Quoting *Langenderfer I*, this Court held:

> To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."

Id. at 116 (*quoting Langenderfer I* at 1057). The perverse result this Court refused to allow in *Cargill* is the precise result that follows from the Sixth Circuit's holding in favor of Langenderfer.

As regards anticompetitive conduct, the Sixth Circuit held there was none:

- **Monopolistic stone pricing:**

  "There was simply *no adequate evidence* to establish that defendants were engaged in monopolistic stone pricing, or that defendants controlled or attempted to control stone or quarrying in any relevant market claimed by plaintiffs." (App. A53) (emphasis as in the original).

- **Price squeeze:**

  "This contention was that "defendants have *used their monopoly power in stone* to gain an unfair advantage in paving." (emphasis added.) As we have seen, however, defendants did not have sufficient market power or price control in limestone to constitute monopoly power." (*Id.* at A54 n.26).

- **Tying:**

> "Nor was there meaningful evidence to show that defendants tied 'the sale of stone and sand to the sale of asphalt,' as contended by plaintiffs at trial. There was no showing that defendants controlled the sources or supply of sand in any relevant market claimed." (*Id.* at A53).

Although the Sixth Circuit alludes to "other anti-competitive conduct," no other alleged acts of anti-competitive behavior that might have injured Langenderfer were submitted to the jury. Nor did the Sixth Circuit identify any other evidence that might support a conclusion that antitrust injury could be found here.[7] There is no claim or evidence of injury to Langenderfer from increased prices; rather, "gov-

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[7] Johnson's raw material acquisitions do not support a finding of antitrust injury:

> [D]efendants may not be held liable for antitrust conduct to the extent that, as asphalt paving contractors, they acquired additional limestone and/or sand sources which added to their efficiency and ability to submit profitable and low bids. . . .

(App. A55). The court suggested that Johnson's quarry site acquisitions "foreclose[d] production and efficient use" of those quarries by Langenderfer. (*Id.* at A61). That suggestion is without antitrust significance. Even if Johnson's ownership of a particular quarry site "foreclosed" a competitor from using that site, there was no evidence that Johnson owned an essential facility. To the contrary, there were numerous quarries in the market (*id.* at A38) and many of them, including one owned by respondents, were better located than any owned by Johnson. (*Id.* at A31). Moreover, there was no refusal to deal or evidence of monopolistic stone prices. (*Id.* at A55).

ernment bidding at *low* prices was at the heart of this case." (App. A67) (emphasis added). This leaves Johnson's low, non-predatory bids as the only possible basis for Langenderfer's injury.

In *Atlantic Richfield*, this Court assumed the defendant had engaged in a vertical price-fixing conspiracy to maintain low prices. 110 S. Ct. at 1888 n.2. The Court recognized that the scheme was *per se* illegal. *Id.* at 1889. The plaintiff in the action, a competitor, argued that it suffered antitrust injury due to losses resulting from the lower prices of firms adhering to the illegal scheme. *Id.* at 1891. This Court rejected the claim and held categorically that, absent predatory pricing, competitor losses due to low prices are not antitrust injury. *Id.*

The affirmance of the judgment for Langenderfer is inconsistent with *Atlantic Richfield*. Like the plaintiff in *Atlantic Richfield*, Langenderfer's loss is attributable to the low, non-predatory prices of Johnson. Injury from low, non-predatory prices is not antitrust injury:

> Antitrust injury does not arise for purposes of § 4 of the Clayton Act, see n.1, *supra*, until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick*, 429 U.S., at 487; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Atlantic Richfield, 110 S. Ct. at 1892 (emphasis as in the original) (citation omitted).

The Sixth Circuit's decision conflicts with *Cargill* and *Atlantic Richfield*. The opinion is not distinguishable from *Cargill* on the basis of a finding of anti-competitive conduct because the court held that none was proved. It is not distinguishable from *Atlantic Richfield* on the basis of predatory pricing because that too is not an issue in this case. The only difference between this case and *Cargill* and *Atlantic Richfield* is that the defendant here, Johnson, is allegedly a monopolist. The Sixth Circuit's opinion must then necessarily rest on the proposition that a monopolist, unlike other firms in the market, may not price its product below competitors' costs. The Sixth Circuit thus undermines its own holding in *Langenderfer I* by stating in effect that it is *not* "in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Langenderfer I*, 729 F.2d at 1057.

If the judgment is not reversed, the only way Johnson could avoid future treble damage liability would be to *raise* its prices. "It would be inimical to the purposes of these laws to award damages for the type of injury claimed here." *Brunswick*, 429 U.S. at 488. Judge Learned Hand warned of such potential abuse of the antitrust laws more than forty years ago:

> The successful competitor, having been urged to compete, must not be turned upon when he wins.

United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

This Court warned in *Matsushita* against results like that reached by the Sixth Circuit:

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly because they chill the very conduct the antitrust laws are designed to protect.

475 U.S. at 594. To protect against such mistakes, the Court should rule that competitor losses from low, non-predatory prices are not antitrust injury and that *Cargill* and *Atlantic Richfield* apply to competitive pricing by firms alleged to have monopoly power.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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